

Privacy Year in Review: The Intersection of the Rights to Privacy and of a Free Press: Can They Co-Exist?

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ABSTRACT

The First Amendment of the United States Constitution has historically been used to provide various protections to the press. Sometimes these protections have allowed for intrusions into an individual's personal privacy though. Current legal remedies for such intrusions are particularly inadequate in today's Information Age. There are four traditional privacy torts for invasion of privacy claims: (1) the tort of invasion of solitude, (2) the tort of public exposure by the media of embarrassing private facts about an individual, (3) the tort of media publicity placing a private individual in a "false light" in the public's eye, and (4) the tort of appropriation of a private individual's name and likeness. The history of all four torts is discussed, and each tort's utility in suits against the media is analyzed. In particular, the difficulty of proving all of the elements of the tort is thoroughly reviewed. Finally, this article discusses the emerging challenges for private individuals to recover for invasion of privacy rights by the media and whether First Amendment rights of the media interfere with post-mortem subjects' rights.

I. HISTORICAL OVERVIEW OF CLASHES BETWEEN AN INDIVIDUAL'S RIGHT TO PRIVACY AND THE MEDIA'S FIRST AMENDMENT RIGHTS

The First Amendment of the United States Constitution guarantees that, "Congress shall make no law ... abridging the freedom of speech, or of the press."¹ The "free speech and free press clauses were designed to secure 'the widest possible dissemination of information from diverse and antagonistic sources.'"² In fact, the United States

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¹ U.S. CONST. amend. I.

² Arlen W. Langvardt, *Stopping the End-Run by Public Plaintiffs: Falwell and the Refortification of Defamation Law's Constitutional Aspects*, 26 AM. BUS. L.J. 665, 670 (1989)

Supreme Court has even recently affirmed that the process of newsgathering itself is protected by the Constitution.³

Nonetheless, journalists have not enjoyed complete protections in the course of their reporting. For instance, undercover reporters are far from regarded as valued reformers when exposing social atrocities, even when done for society's benefit.⁴ Rather than receiving praise, these journalists have often been served with lawsuits, while in the process of collecting truthful information on matters of public interest.⁵ Such lawsuits may largely serve as an indicative reflection of the public's waning support for surreptitious newsgathering tactics.⁶

Further, the emergence of technology capable of instantaneous photography and the growing omnipresence of the media have resulted in a shift in concern for protection of the individual's right to privacy.⁷ Such potentially intrusive methods of newsgathering have posed special risks to the individual's right to privacy.⁸ Unfortunately, the remedies currently available to victims of unwarranted public scrutiny are largely inadequate in today's Information Age. The only available

(quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945))).

³ *People v. Mitchell* (*In re Juror Names*), 233 Mich. App. 604, 612 (1999).

⁴ *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 510-11 (4th Cir. 1999) (involving a lawsuit against ABC for sending its reporters undercover as "employees" of a grocery store in order to expose unsanitary working conditions).

⁵ Susan M. Gilles, *Food Lion as Reform or Revolution: "Publication Damages" and First Amendment Scrutiny*, 23 U. ARK. LITTLE ROCK L. REV. 37, 40 (2000) (the current state of media litigation involves holding the media liable for newsgathering torts rather than for defamation). As a result, in addition to actual damages, general tort law allows the plaintiff to recover nominal, special, general, and punitive damages. 1 Robert D. Sack, *Sack on Defamation: Libel, Slander, and Related Problems* §§ 10.3.1-10.3.5 (3d ed. 2000).

⁶ See Tracy Dreispul, *Circumventing Sullivan: An Argument Against Awarding Punitive Damages for Newsgathering Torts*, 103 DICK. L. REV. 59, 70 (1998) ("Ironically, PrimeTime Live's early investigative reports involved stories similar to those written by Nellie Bly and Upton Sinclair" which had been historically commended and praised for exposing various social ills.).

⁷ W. Kent Davis, *Protecting a Criminal Suspect's Right "To Be Let Alone" in the Information Age*, 33 GONZ. L. REV. 611, 612 (1997).

⁸ For example, particularly troublesome is the current lack of protection for those citizens merely named as *suspects* in criminal cases from the ensuing public scrutiny of their private lives before charges are ever even filed. Davis, *supra* note 4, at 613. See William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960); see also *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

remedies are: 1) defamation suits against the media; 2) right to privacy tort suits against the media; 3) intentional infliction of emotional distress suits against the media; and 4) statutory tort suits against the government.⁹

For instance, before one can successfully seek recompense for damages¹⁰ in an invasion of privacy defamation action against the media, one's status as either a "private" versus a "public" figure must first be determined. The Supreme Court established in its landmark case of *New York Times Co. v. Sullivan*, that anyone classified as a "public figure or official" cannot recover from the media in a defamation suit without first proving falsity and actual malice by clear and convincing evidence.¹¹ In other words, damages in these cases are "typically awarded only when a story's publication or broadcast is itself tortious under libel or privacy law."¹² Thus, there must be sufficient evidence that the defendant entertained serious doubts as to the veracity of the publication, demonstrating reckless disregard for truth or falsity and actual malice.¹³

Nonetheless, the failure to investigate does not alone establish bad faith on the part of the defendant.¹⁴ Instead, First Amendment jurisprudence tolerates some "breathing room" for reasonable factual errors when the media reports on matters of public concern.¹⁵ Thus,

⁹ *Id.* at 615.

¹⁰ Damages include those injuries that flow from "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

¹¹ *N.Y. Times Co. v. Sullivan*, 376 U.S. at 285-86.

¹² Jeffrey Grossman, Note, *First Amendment Implications of Tort Liability for News-Gathering*, 1996 ANN. SURV. AM. L. 583, 614.

¹³ See, e.g., *Journal-Gazette Co. v. Bandido's, Inc.*, 712 N.E.2d 446, 452 (Ind. 1999) (A private individual involved in a public matter must prove falsity and actual malice in order to prevail on a defamation claim against a media defendant); *Huggins v. Moore*, 726 N.E.2d 456, 460 (N.Y. 1999) (Under state defamation law, a private citizen involved in a matter of public interest "must prove that the media defendant 'acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties.'" (quoting *Chapadeau v. Utica Observer-Dispatch, Inc.*, 341 N.E.2d 569, 571 (N.Y. 1975)); see also Davis, *supra* note 4, at 618.

¹⁴ See also *St. Amant v. Thompson*, 390 U.S. 727, 728-29 (1968).

¹⁵ C. Thomas Dienes & Lee Levine, *Implied Libel, Defamatory Meaning, and State of Mind: The Promise of New York Times Co. v. Sullivan*, 78 IOWA L. REV. 237, 289 (1993).

even if a publication contains factual inaccuracies, it is not necessarily defamatory on its face, because the primary purpose driving the First Amendment is to promote open and free discussion of important social issues.¹⁶ Such leeway similarly extends to protect *tortious* conduct that may occur during the newsgathering process as well, in order to promote the discovery of valuable information.¹⁷ As a result, the U.S. Supreme Court continues to weave such protections of a free press into the growing jurisprudential fabric that attempts to balance the competing interests of privacy and the First Amendment.¹⁸ After all, the rights of a free press are designed to protect a reporter's "rational interpretation" of events or statements during the course of newsgathering.¹⁹

To overcome such high hurdles successfully, plaintiffs began seeking theories other than defamation upon which to sue the media.²⁰

¹⁶ N.Y. Times Co. v. Sullivan, 376 U.S. at 271-72.

¹⁷ Dynn Nick, Note, *Food (Lion) for Thought: Does the Media Deserve Special Protection Against Punitive Damage Awards When It Commits Newsgathering Torts?*, 45 WAYNE L. REV. 203, 227 (1999) ("If the balance is not tipped in favor of the media, it is unlikely that journalists will pursue vigorous undercover newsgathering for fear of exposure to large and unpredictable monetary awards.").

¹⁸ *Id.* at 732 ("To insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones.").

¹⁹ Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 519 (1991).

²⁰ See, e.g., Cowras v. Hard Copy, 56 F. Supp. 2d 207, 208 (D. Conn. 1999) (plaintiff alleged intentional and negligent infliction of emotional distress as a result of defendant's broadcast of plaintiff's arrest for driving while intoxicated, instead of relying on a defamation claim); Med Lab. Mgmt. Consultants v. ABC, Inc., 30 F. Supp. 2d 1182, 1186 (D. Ariz. 1998) (relying on the tort claims of fraud, trespass, and eavesdropping since plaintiff was unable to maintain a defamation claim); Russell v. ABC, Inc., No. 94C5768, 1995 WL 330920, at *1 (N.D. Ill. 1995) (alleging intrusion upon seclusion and invasion of privacy after *PrimeTime Live* broadcast an undercover exposé of plaintiff's business practices); see *Food Lion, Inc.*, 194 F.3d at 522; Veilleux v. NBC, 206 F.3d 92 (1st Cir. 2000); Dietemann v. Time, Inc., 44 F.3d 1345 (7th Cir. 1995); see Miller v. NBC, 187 Cal. App. 3d 1463, 1492-93 (Cal. Ct. App. 1986) (holding that First Amendment principles do not preclude plaintiffs from suing a media defendant for tortious conduct such as trespass); Special Force Ministries v. WCCO Television, 584 N.W.2d 789, 793 (Minn. Ct. App. 1998) (holding that media liability for fraud and trespass does not offend First Amendment principles); see also Carolyn K. Foley & David A. Schulz, *Damage Considerations When the Press Is Sued for Gathering the News*, Libel Def. Resource Center Bull., April 30, 1997, reprinted in 1 Libel & Newsgathering Litigation: Getting & Reporting the News, at 129, 132 (PLI Patents, Copyrights, and Literary Prop. Course Handbook Series No. G-522, 1988). But see La Luna Enters. v. CBS Corp., 74 F. Supp. 2d 384, 392 (S.D.N.Y. 1999) (holding that although the plaintiff could proceed with its defamation claim, it could not assert fraud or trespass, because otherwise the "plaintiff could succeed regardless of its defamation claim and the truth or falsity of the broadcast");

By turning to causes of action based on tortious conduct during the newsgathering process, plaintiffs are now required to meet the less arduous burden of preponderance of the evidence.²¹ As a result, not only are they able to recover the same damages as in a defamation suit, but now plaintiffs can also circumvent the “clear and convincing evidence” burden of having to prove falsity and actual malice.²² In other words, “[n]ewsgathering tort cases substitute for libel actions when a plaintiff establishes the proof required by the *Sullivan* test.”²³ Private individual plaintiffs may hold media defendants liable for defamation pursuant to a simple negligence standard.²⁴ Thus, the *Sullivan* test must be applied to defamation cases involving a public figure or official, but not to a private citizen.²⁵ As a result, in order to recover successfully, a plaintiff is required to overcome the very difficult obstacles of demonstrating that: (1) the media defendant is not a public figure; (2) the publication was not of public concern; and (3) the publications were false.²⁶ Otherwise, the media defendant will likely prevail under First Amendment protections.²⁷

This article now turns to a discussion of the right to privacy tort suits as a viable alternative to defamation suits for plaintiffs who had been subjected to intrusive newsgathering tactics. The four traditional privacy tort claims provide more realistic remedies for these individuals who seek to reclaim their privacy after being thrust unwillingly into public scrutiny by the media.

Galveston Newspapers, Inc. v. Norris, 981 S.W.2d 797, 801 (Tex. App. 1998) (holding that if a plaintiff cannot maintain a defamation claim, he cannot rely on the same facts to file a claim for tortious interference with contract).

²¹ See W. PAGE KEETON ET AL., *THE LAW OF TORTS* 269 (5th ed. 1984) (“The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result.”).

²² Jacqueline A. Egr, *Closing the Back Door on Damages: Extending the Actual Malice Standard to Publication-Related Damages from Newsgathering Torts*, 49 KAN. L. REV. 693, 694-95 (2001).

²³ Dreispul, *supra* note 6, at 76-77.

²⁴ *Gertz*, 418 U.S. at 345-48.

²⁵ WILLIAM L. PROSSER ET AL., *CASES AND MATERIALS ON TORTS*, 914-15 (8th ed. 1988).

²⁶ Emily Heller, *Jewell's Lawyers Say a Libel Suit Is a Probability*, FULTON COUNTY DAILY REP., Aug. 27, 1996, at 2-3.

²⁷ *Id.*

II. DEFINING THE FOUR TRADITIONAL PRIVACY TORTS IN INVASION OF PRIVACY CLAIMS ASSERTED AGAINST THE MEDIA

Prior to 1890, there had been no law establishing the right to privacy, until Samuel D. Warren and Louis D. Brandeis proposed a new tort formally recognizing the invasion of privacy.²⁸ Since then, their article has been deemed "perhaps the most influential law review article ever published" because of its innovative legal concept of privacy, separate from the existing torts of libel and slander.²⁹ This new tort now recognized the individual's right to be left alone, thereby protecting the private affairs of citizens from unsolicited publicity.³⁰

The tort of invasion of privacy was further defined in 1960 as four distinct interests of the plaintiff: (1) intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; (2) public disclosure of embarrassing private facts about the plaintiff; (3) publicity which places the plaintiff in a false light in the public eye; and (4) appropriation of the plaintiff's name or likeness for the defendants' advantage.³¹ The Restatement (Second) of Torts later adopted these four categories as the basis of the tort.³² Each of these four tort causes of action will be discussed in full below.

A. THE TORT OF INVASION OF SOLITUDE, OR INTRUSION INTO AN INDIVIDUAL'S PRIVATE AFFAIRS, BY THE MEDIA.

Of the four privacy torts, the tort of intrusion into private matters is perhaps the one that best captures the common understanding of an invasion of privacy. It encompasses unconsented to physical intrusion into the home . . . or other place the privacy of which is legally recognized as well as

²⁸ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

²⁹ RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS*, 1218 (6th ed. 1995).

³⁰ Prosser et al., *supra* note 25, at 951.

³¹ *Id.* at 389.

³² Epstein, *supra* note 29, at 1223.

unwarranted sensory intrusions such as eavesdropping, wiretapping[,] and visual or photographic spying.³³

The right of privacy means, at its most fundamental level, the right to be left alone.³⁴ The right is “not one of total secrecy but rather a right to *define* one’s circle of intimacy – to choose who shall see beneath the quotidian mask.”³⁵ In other words, secret monitoring by a defendant denies the speaker an important aspect of privacy of communication – the right to control the nature and extent of the firsthand dissemination of his statements.³⁶ Clandestine recording by the media of plaintiff’s private conversation without authorization is therefore often a *per se* invasion of privacy, regardless of whether the conversation could have been overheard by a third party.³⁷ As a result, the right to privacy affords the speaker the reassurance that information disclosed to an intended audience will remain non-public.³⁸

The elements of the tort for intrusion of privacy are: (1) public disclosure; (2) of a fact concerning the private life of an individual; (3) which would be highly offensive and objectionable to the reasonable person of ordinary sensibilities; and (4) which is not of legitimate public concern.³⁹ The last factor relates to “newsworthiness” and is subject to a three-part test examining the social value of the published

³³ J.P. *Turnbull v. American Broadcasting Co.*, 2004 U.S. Dist. LEXIS 24351 (2004), at *35-36.

³⁴ *Gill v. Curtis Publishing Co.*, 38 Cal. 2d 273 (1952).

³⁵ *Hill v. National Collegiate Athletic Assn.*, 7 Cal. 4th 1, 25 (1994) (quoting *Briscoe v. Reader’s Digest Association, Inc.*, 4 Cal. 3d 529, 534 (1971)).

³⁶ *Sanders v. American Broadcasting Co., Inc.*, 20 Cal. 4th 907, 914 (1999).

³⁷ *Id.* The California Supreme Court has explained that the mere fact that a person can be seen by others does not mean that he can legally be forced to subject himself to being watched or observed by everyone. Instead, an individual has a reasonable expectation of privacy in his home.

³⁸ *Times-Mirror Co. v. Superior Court*, 198 Cal. App. 3d 1420, 1427 (1988).

³⁹ *Shulman*, 18 Cal. 4th at 214 (quoting *Diaz v. Oakland Tribune, Inc.*, 139 Cal. App. 3d 118, 126 (1983)). *But see Cox Broadcasting Co. v. Cohn*, 420 U.S. 469 (1975) (where the U.S. Supreme Court indicated that an action for invasion of privacy cannot be maintained when the subject matter of the publicity is a matter of “legitimate concern to the public.”). *See also Connick v. Myers*, 461 U.S. 138, 143 (1983); *Killilea v. Sears, Roebuck & Co.*, 27 Ohio App. 3d 163 (1985).

facts, the depth of intrusion into ostensibly private affairs, and whether the person acceded voluntarily to a position of public notoriety.⁴⁰

State courts are witnessing a growing number of plaintiffs seeking remedies for invasion of privacy by media-defendants "who intentionally intrude, physically or otherwise, upon the solitude or seclusion of another."⁴¹ Such invasions of privacy may be actionable, particularly if juxtaposed with material that infers a negative association with the allegedly offensive subject matter.⁴² Some courts have gone so far as to acknowledge this formally as a constitutional right "to be let alone."⁴³ Others have recognized this tort during the course of newsgathering as an intrusion into private places, conversations or matter.⁴⁴

⁴⁰ *Diaz v. Oakland Tribune, Inc.*, 139 Cal. App. 3d at 132.

⁴¹ RESTATEMENT (SECOND) OF THE LAW OF TORTS § 652B (1976).

⁴² *O'Hilderbrandt v. Columbia Broadcasting System, Inc.*, 40 Cal. App. 3d 323, 331 (1974).

⁴³ *See Arnold v. Truemper*, 833 F. Supp. 678, 684 (N.D. Ill. 1993) ("The court recognizes that the constitution does protect 'a private realm of family life which the state cannot enter.'"); *Housh v. Peth*, 165 Ohio St. 35 (1956); *see also Sustin v. Fee*, 69 Ohio St. 2d 143 (1982).

⁴⁴ *See generally* *J.P. Turnbull v. American Broadcasting Co.*, 2004 U.S. Dist. LEXIS 24351; *M.G. v. Time Warner Inc.*, 89 Cal. App. 4th 623 (2001) (where the court found that plaintiffs had shown a reasonable probability of success on their invasion of privacy claim. Further, the invasion of privacy by the broadcasters far outweighed the values of any journalistic impact or credibility.); *Broughton v. McClatchy Newspapers, Inc.*, 161 N.C. App. 20 (2003); *Brooks v. Physicians Clinical Laboratory Inc.*, 2000 U.S. Dist. LEXIS 13603 (2000); *Castro v. NYT Television, Inc.*, 370 N.J. Super. 282 (2004); *Steele v. The Spokesman-Review*, 138 Idaho 249 (2002); *The Times Picayune Publishing Corp. v. U.S. Dept. of Justice*, 37 F. Supp. 2d 472 (1999) (Plaintiff-newspaper filed an action under the Freedom of Information Act (FOIA) to compel defendant United States to release a mug shot of a well-known businessman. Yet, the court held that the defendant met its burden of establishing that the exemption under 5 U.S.C. § 552(b)(7)(C) of the FOIA applied. Specifically, the requested information had been compiled for law enforcement purposes. Therefore, disclosure of the mug shot could reasonably be expected to constitute an invasion of personal privacy. Further, the court held that disclosure of the mug shot did not serve any public interest that the FOIA was designed to protect. As a result, the court found in favor of protecting the businessman's privacy from intrusive newsgathering tactics.); *Haskell v. Stauffer Communications, Inc.*, 26 Kan. App. 2d 541 (1999). *But see* *Gales v. CBS Broadcasting, Inc.*, 2004 U.S. Dist. LEXIS 22937 (2004) (where plaintiff-jurors who awarded a notorious \$150 million verdict in a diet drug case claimed invasion of privacy by CBS for producing a program focusing on multi-million dollar verdicts rendered in rural areas of Mississippi. The court found that plaintiffs' invasion of privacy claim failed because the broadcast made no reference to the jurors individually.); *Tyne v. Time Warner Entertainment Co.*, 336 F.3d 1286 (2003) (involving news stories, a best-selling book, and a motion picture released dramatizing the lives of decedents lost at sea after their commercial fishing vessel was caught in a severe storm. Florida's general rule is that relatives of a decedent may not maintain a cause of action for invasion of privacy either based

For example, in *J.P. Turnbull v. American Broadcasting Co.*, plaintiff actors claimed that ABC News had invaded their privacy by secretly videotaping their conversations and activities for a newsmagazine story about casting workshops.⁴⁵ Although they complained the program portrayed them as desperate “whores” on the outskirts of the acting community, their claims focused on the intrusion of privacy rather than on the content of the broadcast.⁴⁶ Specifically, the actors sought an injunction to ban the use of hidden cameras as “news gathering tools.”⁴⁷ The court held that even though the conversations may have potentially been overheard by others, the actors nonetheless had a reasonable expectation that their conversations would not be recorded.⁴⁸ Yet, the court ultimately found the actors lacked standing to sue on behalf of such an amorphous class of individuals demanding an overly broad injunction.⁴⁹

States are now more frequently enacting legislation or developing case law to prevent one from recording a conversation without the other party’s consent and knowledge.⁵⁰ For instance, in determining whether a recorded conversation is “confidential” within the meaning of Cal. Penal Code § 632, the *Frio* test provides guidance: “A

on their own privacy interests or as a representative for the deceased where the alleged invasion was directed primarily at the deceased. Further, the motion picture was not a commercial purpose and thus was entitled to First Amendment protection. Moreover, the portrayal of the surviving children was not sufficiently egregious in nature to establish a claim of invasion of privacy. Finally, none of the facts disclosed were alleged to be true. Therefore, the surviving plaintiffs had no invasion of privacy cause of action based on public disclosure of private facts.); *Harris v. Seattle*, 2003 U.S. Dist. LEXIS 3553 (2003) (The court concluded that the plaintiff-politician failed to state a prima facie case against defendant-broadcasters for unwarranted intrusion into her seclusion or an unjustified public disclosure of private facts after airing two allegedly injurious reports about her. The fact that the politician gambled in a public casino did not constitute a private fact disclosed by the broadcasts.).

⁴⁵ *J.P. Turnbull v. American Broadcasting Co.*, 2004 U.S. Dist. LEXIS 24351.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ In cases where only one injury is alleged, however, courts have applied the “single-publication rule.” As a result, a plaintiff may have only one cause of action for a damaging publication rather than multiple claims for torts such as defamation, invasion of privacy, personal injury, civil rights violations, fraud, or deceit. *Strick v. Superior Court*, 143 Cal. App. 3d 916, 922-25 (1983).

conversation is confidential if a party to that conversation has an objectively reasonable expectation that the conversation is not being overheard or recorded.”⁵¹ Further, courts in California have determined that an action for intrusion consists of two elements: (1) intrusion into a private place, conversation, or matter, (2) in a manner highly offensive to a reasonable person.⁵²

The first element requires that the court determine whether the defendants intentionally invaded the *solitude or seclusion* of another’s private place or conversation. There is no liability for examining a public record concerning the plaintiff or for observing or photographing a plaintiff in public. In other words, “there can be no invasion of privacy [by intrusion] claim based upon the use of public records as to which a plaintiff had no expectation of privacy.”⁵³ Instead, to demonstrate an actionable invasion of privacy during the course of newsgathering, the plaintiff must show that defendant broadcaster penetrated some zone of physical or sensory privacy, or pried into plaintiff’s confidential personal records. But, the plaintiff must have had an objectively reasonable expectation of seclusion in the place, conversation, or data source.⁵⁴

For instance, in *Broughton v. McClatchy Newspapers, Inc.*,⁵⁵ the plaintiff had been involved in litigation with her ex-husband for nearly 30 years when defendant writer became interested in publishing an article about it. The plaintiff subsequently sued the newspaper for invasion of privacy, but the court held that the reporter’s reliance on public records did not constitute intrusion. Nor did the court find any trespass, because the litigant engaged in “social” conversation with the writer and did not ask her to leave. Instead, the court explained that the fact that “supersensitive persons with morbid imaginations may be able, by reading between the lines of an article, to discover some

⁵¹ *Flanagan v. Flanagan*, 27 Cal. 4th 766, 768 (2002) (citing *Frio v. Superior Court*, 203 Cal. App. 3d 1480 (1988)).

⁵² *J.P. Turnbull v. American Broadcasting Co.*, 2004 U.S. Dist. LEXIS 24351, at *37.

⁵³ *Burgess v. Busby*, 142 N.C. App. 393, 406 (2001).

⁵⁴ See also *id.* (concluding that “[g]enerally, there must be a physical or sensory intrusion or an unauthorized prying into confidential personal records to support a claim for invasion of privacy by intrusion.”); *Toomer v. Garrett*, 155 N.C. App. 462 (2002).

⁵⁵ *Broughton v. McClatchy Newspapers, Inc.*, 161 N.C. App. at 22-34.

defamatory meaning therein is not sufficient to make them [injurious].”⁵⁶

Yet even an individual who lacks a reasonable expectation of complete solitude, in that the conversation could be overheard (though not by the general public), may still have a viable claim for intrusion if a defendant reporter covertly taped the conversation.⁵⁷ The “mere fact that an intruder is in pursuit of a ‘story’ does not justify an otherwise invasive intrusion.”⁵⁸ In other words, “violation of well-established legal areas of physical or sensory privacy – trespass into a home or tapping a personal telephone line – could rarely be justified by a reporter’s need to get the story.”⁵⁹ Such acts would surely offend the principles of legality even if the information sought was of weighty public concern.⁶⁰

The question before the court becomes whether the First Amendment provides “a wall of immunity protecting newsmen from any liability for their conduct while gathering news.”⁶¹ Courts have long resisted extension of this right to protect actual crimes committed in newsgathering, as there is no threat to a free press in requiring members of the media to act within the scope of the law.⁶² Even though courts recognize a number of routine reporting techniques, such as questioning sources,⁶³ which would generally not be actionable,⁶⁴ the First Amendment does not shelter the media from tortious conduct. “[T]he press may not with impunity break and enter an office or dwelling to gather news.”⁶⁵ Therefore, it is undisputed “that the publisher of a newspaper has no special immunity from the

⁵⁶ *Id.*

⁵⁷ Sanders, 20 Cal. 4th at 923.

⁵⁸ Shulman v. Group W Productions, Inc., 18 Cal. 4th 200, 236 (1998) (citing Miller v. National Broadcasting Co., 187 Cal. App. 3d 1463, 1483-84 (1986)).

⁵⁹ *Id.* at 237.

⁶⁰ *Id.* (citing Cohen v. Cowles Media Co., 501 U.S. 663, 669 (1991)).

⁶¹ Galella v. Onassis, 487 F.2d 986, 995 (2d Cir. 1973).

⁶² *Id.* at 995-96.

⁶³ *Id.*

⁶⁴ *Id.* (citing Nicholson v. McClatchy Newspapers, 177 Cal. App. 3d 509, 519 (1986)).

⁶⁵ Cohen v. Cowles Media Co., 501 U.S. at 665-66.

application of general laws. He has no special privilege to invade the rights and liberties of others.”⁶⁶ Such an analysis has always demanded a careful balancing of free press and privacy interests.

The U.S. Supreme Court has already held in *Cohen* that “truthful information sought to be published must have been lawfully acquired.”⁶⁷ In fact, the First Amendment has never been construed to render the media immune from torts committed during the course of newsgathering.⁶⁸ Further, the right of a free press is “not a license to trespass, steal, or intrude stealthily by electronic means into the precincts of another’s home or office.”⁶⁹ Currently, no First Amendment interests exist in protecting journalists from calculated misdeeds.⁷⁰

Moreover, courts are often even more protective of privacy when invasion by the press is greatly disproportionate to the relevance between the newsworthy event and the facts disclosed. Generally,

⁶⁶ *Id.* (quoting *Associated Press v. NLRB*, 301 U.S. 103, 132-33 (1937)). For instance, the Constitution does not relieve a reporter of the obligation shared by all citizens to respond to a grand jury subpoena, requiring him to answer questions relevant to a criminal investigation, even if he might be required to reveal a confidential source.

⁶⁷ *Id.* at 669.

⁶⁸ Instead, the First Amendment guarantees reporters only the fundamental right to a free press. As a result, the “newsworthiness of facts about a private person involuntarily thrust into an event of public interest incorporates considerable deference to reporters and editors, avoiding the likelihood of unconstitutional interference with the freedom of the press to report truthfully on matters of legitimate public interest. In general, it is not for a court or jury to say how a particular story is best covered. Such a constitutional privilege to publish truthful material ceases only when an editor abuses his broad discretion to publish matters of legitimate public interest. Therefore, by confining interference to only extreme cases, the courts avoid unduly restricting the exercise of effective editorial judgment.” Shulman, 18 Cal. 4th at 224-25.

⁶⁹ *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971); see *Cohen v. Cowles Media Co.*, 501 U.S. at 669 (enumerating cases that concluded the media does not have a privilege to violate generally applicable laws. Moreover, the Court added that the “well-established line of decisions [held] that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news.”); *Branzburg v. Hayes*, 408 U.S. 665, 682-83 (1972) (determining that courts have not been interpreting the First Amendment in such a way as to insulate the media from liability for violating general principles of law); Michael W. Richards, *Tort Vision for the New Millennium: Strengthening News Industry Standards as a Defense Tool in Law Suits Over Newsgathering Techniques*, 10 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 501, 507 (2000).

⁷⁰ *Dietemann v. Time, Inc.*, 449 F.2d at 250.

intensely personal or intimate revelations will not be newsworthy, especially where they bear only slight relevance to a topic of public concern.⁷¹ Such a lack of newsworthiness greatly supports an individual's claim for intrusion that publication yielded unwanted publicity to private aspects of his life.⁷²

However, the debate grows increasingly perplexing for the courts when journalists seek to exercise their First Amendment rights as members of the media in direct conflict with an individual's desire for privacy.⁷³ Although citizens are entitled to a reasonable expectation of privacy, some overriding interests of society may demand intrusion into seemingly non-public matters.⁷⁴ Yet such interference of an individual's seclusion may be no greater than what is necessary to protect the countervailing social need.⁷⁵

B. THE TORT OF PUBLIC DISCLOSURE BY THE MEDIA OF EMBARRASSING PRIVATE FACTS ABOUT AN INDIVIDUAL

A claim for public disclosure of embarrassing private facts entails the dissemination of confidential information about an individual that a reasonable person would find highly offensive and which does not pertain to a legitimate public concern.⁷⁶ However, this tort "applies

⁷¹ Shulman, 18 Cal. 4th at 226.

⁷² Anti-Defamation League of B'nai B'rith v. Superior Court, 67 Cal. App. 4th 1072, 1086 (1998); *see also* Keno v. Station KYW-AM Infinity Broadcasting Corp., 2004 U.S. Dist. LEXIS 21491 (2004)(State courts are also applying the tort of intrusion to contexts other than that of the newsgathering process as well. For instance, in 2004, an employee alleged verbal abuse, physical threats, and humiliation at the workplace after notifying her supervisor of having been diagnosed with bipolar disorder. The court held that the employee's invasion of privacy claim was not subject to dismissal because the complaint made sufficient allegations of personal animus. Specifically, her supervisor had: directed her to be escorted from the building by a security guard in front of other employees, sent an e-mail to all employees stating that she should not be granted access to the building, required her to attend business lunches where she was interrogated about her illness, and forced her to undergo a psychiatric evaluation as a condition of continued employment. Thus, the plaintiff had properly stated a claim for invasion of privacy that subsequently led to her wrongful discharge.).

⁷³ Galella v. Onassis, 487 F.2d at 991-92.

⁷⁴ *Id.* at 995-96.

⁷⁵ *Id.*

⁷⁶ RESTATEMENT (SECOND) OF THE LAW OF TORTS § 652D (1976); *See* Riley v. Random House, Inc., 2000 DNH 84, at *51-52 (concluding that New Hampshire recognizes a cause of action based upon the public disclosure of private facts)(citing Hamberger v. Eastman, 106

only to publicity given to matters concerning the private, as distinguished from the public, life of the individual.”⁷⁷ As such, courts have long held that “to establish a claim for public disclosure of private facts or intrusion into solitude or seclusion, the areas intruded upon must be, and are entitled to be, private.”⁷⁸ This tort differs from defamation in that although the injurious statement is necessarily asserted to be true, the injury actually stems from publication of this *true but private* matter.⁷⁹

Thus, the specific elements required of a proper cause of action for public disclosure of embarrassing private facts include: (1) the disclosure of information; (2) that is highly offensive to a reasonable person; and (3) that is of no legitimate concern to the public.⁸⁰

However, the Tenth Circuit established that the “First Amendment protects the publication of private facts that are ‘newsworthy,’ that is, of legitimate concern to the public.”⁸¹ In fact, even if the private fact is not in and of itself newsworthy, its publication will still be protected if it has “substantial relevance to,”⁸² or “any substantial nexus with a newsworthy topic.”⁸³ As a result, such protections afforded to the

N.H. 107, 111 (1964)(quoting RESTATEMENT OF THE LAW OF TORTS § 867)) (“[A] person who unreasonably and seriously interferes with another’s interest in not having his affairs known to others . . . is liable to the other.”); Further, the court explained that such unreasonable interference occurred “‘where intimate details of the life of one who has never manifested a desire to have publicity are exposed to the public.’” Hamberger, 106 N.H. at 111 (quoting RESTATEMENT OF THE LAW OF TORTS § 867, cmt. d).

⁷⁷ *Id.* at § 652D, cmt. b. (“There is no liability when the defendant merely gives further publicity to information about the plaintiff that is already public.”); *Fry v. Ionia Sentinel-Standard*, 101 Mich. App. 725, 729 (1980).

⁷⁸ *Hoskins v. Howard*, 132 Idaho 311 (1998); *Roe v. Heap*, 2004 Ohio 2504 (2004), at *75 (citing RESTATEMENT (SECOND) OF THE LAW OF TORTS § 652D, cmt. b, 385)(explaining that “if the record is not one open to public inspection, as in the case of income tax returns, it is not public, and there is an invasion of privacy when it is made so.”).

⁷⁹ [Emphasis added] See RESTATEMENT (SECOND) OF THE LAW OF TORTS § 652D, Special Note on Relation of § 652D to the First Amendment to the Constitution (1977).

⁸⁰ *Smith v. Calvary Christian Church*, 233 Mich. App. 96, 113-14 (1999)(citing *Doe v. Mills*, 212 Mich. App. 73, 80-1 (1995)). Ordinarily, the jury must determine whether public disclosure involved embarrassing private facts. *Id.*

⁸¹ *Gilbert v. Medical Economics Co.*, 665 F.2d 305, 308 (10th Cir. 1981).

⁸² *Riley v. Random House, Inc.*, 2000 DNH 84, at *54 (quoting *Gilbert*, 665 F.2d at 308).

⁸³ *Gilbert*, 665 F.2d. at 309.

media have prevented a multitude of claims from succeeding under this privacy tort.

For example, in 2002, a court had dismissed a claim for offensive and objectionable public disclosure of private facts where plaintiff had brought a claim against the producer of a television show in which she had participated.⁸⁴ During the course of filming, the plaintiff was caught on tape kissing a man. Plaintiff's kisses occurred in plain view of the public, with a man inside the bar and on a city sidewalk. Defendant broadcaster subsequently aired these video clips. In so finding, the court explained that disclosure of the fact that plaintiff kissed the man in the bar's bathroom was neither private nor so offensive and objectionable that the producer should have realized that it would be offensive.⁸⁵ Thus, the court found in favor of the media defendants, insulating their free speech rights from attack.

Other jurisdictions similarly recognize "newsworthiness" as a defense for the media, invoking First Amendment protection.⁸⁶ Specifically, one California court held that "[d]ue to the supreme mandate of the constitutional protection of freedom of the press even a tortious invasion of one's privacy is exempt from liability if the publication of private facts is truthful and newsworthy."⁸⁷ Thus, in bringing an action for public disclosure of a private fact, if it can be demonstrated that the contents of a publication are of legitimate public concern, the plaintiff is unable to establish a lack of newsworthiness.⁸⁸ As a result, the publication would be protected if it had some substantial relevance to a matter of legitimate public interest.⁸⁹

In *Stern v. WGNO, Inc.*,⁹⁰ for instance, the court had affirmed the television station's special motion to strike after finding there was no probability of success on the plaintiff's claim of disclosure of private

⁸⁴ *Daly v. Viacom, Inc.*, 238 F. Supp. 2d 1118 (2002).

⁸⁵ *Id.*

⁸⁶ John J. Walsh et al., *Media Misbehavior and the Wages of Sin: The Constitutionality of Consequential Damages for Publication of Ill-Gotten Information*, 4 WM. & MARY BILL RTS. J. 1111, 1122 (1996)(citing *Costlow v. Cusimano*, 311 N.Y.S.2d 92, 95 (App. Div. 1970)).

⁸⁷ *Sipple v. Chronicle Publ'g Co.*, 154 Cal. App. 3d 1040, 1046 (1984).

⁸⁸ *Shulman*, 18 Cal. 4th at 215.

⁸⁹ *Id.* at 224.

⁹⁰ *Stern v. WGNO, Inc.*, 806 So. 2d 98 (La. Ct. App. 2001).

facts against the defendant. The plaintiff student asserted a claim against defendants for airing video of security guards searching him in a report about juvenile truancy. The court found there was no public disclosure of private facts, because the televised event had occurred on a public sidewalk and in a public lobby. The plaintiff had clearly been in the public view at the time. Further, the court held that the video footage was reasonable given the important and newsworthy topic of the story. The news station had a legitimate purpose in airing the report and the footage was necessary to show that there was an effort to address such issues in the community. Thus, the court held in favor of protecting the media when important social values are implicated.

Moreover, a television station in Atlanta had broadcasted the name of a rape/murder victim in violation of a state statute that made it a misdemeanor to publicize the identity of rape victims, even when the name was an official part of the court record.⁹¹ The victim's father subsequently filed suit against Cox Broadcasting, claiming an invasion of privacy.⁹² The television station asserted protection under the First Amendment.⁹³

The U.S. Supreme Court again ruled in favor of guarding the broadcaster's rights, concluding that, "the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records."⁹⁴ Instead, if private interests are to be protected, it is up to the States to better "respond by means which avoid public documentation or other exposure of private information."⁹⁵ But, "once true information is disclosed in public court documents, the press cannot be sanctioned for publishing it."⁹⁶ As a result, this tort, consistent with the common law tradition, held that the media was free to divulge facts that were already a matter of public record without fear of incurring liability.⁹⁷

⁹¹ Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 472-74 (1975).

⁹² *Id.* at 474.

⁹³ *Id.* at 476.

⁹⁴ *Id.* at 496.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Prosser, *supra* note 25, at 968 n.5.

Therefore, such protections favoring broadcasters discouraged a multitude of claims from succeeding under this privacy tort. In order to overcome such presumptions in favor of the media, not only must the publication of private facts deeply offend a reasonable person, but the personal information divulged must also lack any substantial relevance to legitimate newsworthy matter.⁹⁸ The most problematic issue for courts is resolving this tension between the rights of a free press and the privacy interests of individual citizens. Nonetheless, there are still some jurisdictions that have elected to avoid tackling such issues by refusing to recognize a cause of action for the invasion of privacy by disclosure of private facts.⁹⁹

C. THE TORT OF MEDIA PUBLICITY PLACING A PRIVATE INDIVIDUAL IN A "FALSE LIGHT" IN THE PUBLIC'S EYE.

Plaintiffs also have the option of pursuing a "false light" claim when they feel the media has wrongly publicized information about them that a reasonable person would find offensive, portraying them negatively in the public's eye.¹⁰⁰

One California court defined a proper "false light" claim as one entailing an act which exposed a person to "hatred, contempt, ridicule, or obloquy and assumes the audience will recognize it as such."¹⁰¹ Specifically, to state a viable claim for false light invasion of privacy, the plaintiff must prove that: (1) the defendants gave publicity to a matter placing the plaintiff before the public in a false light; (2) the

⁹⁸ *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1232 (7th Cir. 1993).

⁹⁹ *Burgess v. Busby*, 142 N.C. App. 393 (2001)(citing *Hall v. Post*, 323 N.C. 259 (1988)).

¹⁰⁰ RESTATEMENT (SECOND) OF THE LAW OF TORTS § 652E (1976). See e.g., *Nolan v. Campbell*, 13 Neb. App. 212 (2004); *Harris v. Seattle*, 315 F. Supp. 2d 1105 (2004); *Mancari v. Infinity Broadcasting East, Inc. d/b/a WBBM Newsradio 780*, 2004 U.S. Dist. LEXIS 23606 (2004); *Mazur v. Szporer*, 2004 U.S. Dist. LEXIS 13176 (2004); *Bloomquist v. Albee*, 2004 U.S. Dist. LEXIS 19573 (2004); *Flatt v. Tennessee Secondary Schools Athletic Association*, 2003 Tenn. App. LEXIS 7 (2003)(concluding that Tennessee recognizes a tort of false light invasion of privacy); *Myers v. The Telegraph*, 332 Ill. App. 3d 917 (2002)(stating that a false light invasion of privacy claim protects one's interest in being left alone from false publicity); *Lane v. MRA Holdings, LLC d/b/a MRA Video*, 242 F. Supp. 2d 1205 (2002)("The overwhelming weight of authority applying Florida law has recognized a cause of action for false light invasion of privacy."); *Flowers v. Little, Brown & Co.*, 310 F.3d 1118 (2002)(holding that plaintiff, under Nevada law, had properly stated a claim for false light because she had alleged emotional harm separate from injury to her reputation.).

¹⁰¹ *Aisenson v. American Broadcasting Co.*, 220 Cal. App. 3d 146, 161 (1990).

false light would be highly offensive to reasonable persons under the circumstances; and (3) the defendants had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.¹⁰²

Often, this tort action has similarly proven difficult for plaintiffs because of its close resemblance to defamation, resulting in the dismissal of many of these lawsuits.¹⁰³ In fact, some jurisdictions refuse even to recognize a cause of action for "false light" in the public eye invasion of privacy.¹⁰⁴ Nonetheless, in those jurisdictions that do

¹⁰² *McCormack v. Okla. Publ'g Co.*, 613 P.2d 737, 740 (Okla. 1980); *compare Stern v. WGNO, Inc.*, 806 So. 2d at 101 (citing *Perere v. Louisiana Television Broadcasting Corp.*, 812 So. 2d 673 (La. App. 1st Cir. 2001)) (Louisiana law recognizes a 'false light' invasion of privacy cause of action arising from publicity which unreasonably places the plaintiff in a false light before the public. However, such a claim for invasion of privacy requires three elements for consideration: a privacy interest, falsity, and unreasonable conduct.)).

¹⁰³ *Flowers v. Little, Brown & Co.*, 310 F.3d at 1132 (quoting 1 J.T. McCarthy, *The Rights of Publicity and Privacy* § 5:105, at 5-241 to-244 (2d ed. 2000)) ("courts have yet to draw a clear and distinct line between [defamation and false light]"); *but see Moldea v. New York Times Co.*, 15 F.3d 1137, 1151 (D.C. Cir. 1994) ("[a] plaintiff may only recover on one of the two theories [the torts of defamation or false light invasion of privacy] based on a single publication, but is free to plead them in the alternative."). *See also Easter Seal Soc. for Crippled Children & Adults v. Playboy Enters., Inc.*, 530 So. 2d 643, 647 (La. App. 1988) ("If the publicity is an accurate portrayal of the public display, if the publicity is not unreasonable and false, then plaintiff has no actionable privacy interest, even if the publicity has caused embarrassment, offense, or damage."); *Hussain v. Palmer Communications Inc., d/b/a KFOR-TV*, 60 Fed. Appx. 747 (2003) (where the court found that KFOR's news reports were neither substantially false nor highly offensive, as they were reports about an unidentifiable person. Further, plaintiff failed to offer proof that the defendants knew the information was false or that they had acted recklessly in broadcasting the matter. As a result, there was no proper claim of false light invasion of privacy.); *Tyne v. Time Warner Entertainment Co., d/b/a Warner Bros. Picture*, 336 F.3d 1286 (2003) (The court held that plaintiffs, survivors of decedent, did not have standing to fall into the narrow relational right of privacy exception to common law false light invasion of privacy.); *Weyrich v. The New Republic, Inc.*, 344 U.S. App. D.C. 245 (2001); *Heekin v. CBS Broadcasting, Inc.*, 789 So. 2d 355 (2001); *Klayman v. Segal*, 783 A.2d 607 (2001); *Zeran v. Diamond Broadcasting, Inc.*, 203 F.3d 714 (2000); *Davis v. Emmis Publ'g Corp.*, 244 Ga. App. 795 (2000); *West v. Media General Operations, Inc., d/b/a WDEF-TV 12*, 2001 U.S. Dist. LEXIS 25230 (2001).

¹⁰⁴ *Renwick v. News & Observer Pub. Co.*, 310 N.C. at 312; *Cain v. Hearst Corp.*, 878 S.W.2d 577, 579-80 (Tex. 1994) (concurring with other jurisdictions that refuse to recognize such a tort on the grounds that it is largely duplicative while chilling free speech); *Roe v. Heap*, 2004 Ohio 2504 (2004) (the Ohio Court of Appeals declined to recognize the tort of false light invasion of privacy); *The Denver Publ'g Co., d/b/a Rocky Mountain News*, 54 P.3d 893 (2002) (Colorado joined those jurisdictions that do not recognize false light as a viable invasion of privacy tort. Instead, the state supreme court found that the tort was highly duplicative of defamation. Further, the subjective component of false light claims had a potential chilling effect on First Amendment freedoms.); *Franklin Prescriptions Inc. v. The New York Times Co.*, 2001 U.S. Dist. LEXIS 12216 (2001) ("New York does not have a

acknowledge the false light tort claim, plaintiffs must overcome difficult challenges to establish a successful cause of action.

For instance, in *Botts v. The New York Times Co.*, the court found that the plaintiff had not stated a proper claim for false light invasion of privacy.¹⁰⁵ The publicized photograph in contention portrayed a young man drinking in a dilapidated trailer with a caption indicating his name was that of the plaintiff. The court concluded that such a publication did not constitute a major misrepresentation of the plaintiff.¹⁰⁶ Therefore, there was no valid false light invasion of privacy cause of action.

Likewise, in *Schivarelli v. CBS, Inc.*,¹⁰⁷ the court found that the broadcaster's 30-second promotion of an investigative report about an unidentified business owner who was allegedly cheating the city, was not actionable as false light invasion of privacy. In so holding, the court explained that the report had expressed an opinion without factual content and was too conclusory to be objectively verifiable. As such, there was no valid false light invasion of privacy claim. Lastly, because the segment was broadcast for the noncommercial purpose of promoting the defendant's news reports, the Illinois Right of Publicity Act precluded the owner's claim for commercial misappropriation as well.

Similarly, the chairman of a publicly-traded company, in *Howard v. Antilla*,¹⁰⁸ sued a reporter for false light invasion of privacy, after the journalist published information about a rumor regarding a variety of alleged prior convictions for securities fraud, violation of the White Slave Act, conspiracy to defraud, and interstate transportation of stolen property. Short sellers of stock in the company, who stood to profit from a decline in stock price, were responsible for circulating the rumor, however. Nonetheless, the court found that the reporter had properly investigated the issue for over a month, interviewing a variety of officials before publishing her article, offering evidence on both sides without drawing a definitive conclusion. As a result, the court

common law tort protecting privacy against publicity that unreasonably places a person in a 'false light.'") (quoting *Cardone v. Empire Blue Cross & Blue Shield*, 884 F. Supp. 838, 848 (S.D.N.Y. 1995)) (citing *Howell v. New York Post*, 81 N.Y.2d 115 (1993)); *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

¹⁰⁵ *Botts v. The New York Times Co.*, 2003 U.S. Dist. LEXIS 23785 (2003).

¹⁰⁶ *Id.*

¹⁰⁷ *Schivarelli v. CBS, Inc.*, 333 Ill. App. 3d 755 (2002).

¹⁰⁸ *Howard v. Antilla*, 294 F.3d 244 (2002).

concluded that the chairman had failed to establish that the journalist intended or knew that the article falsely accused him of being a known convicted felon. Therefore, the plaintiff's false light invasion of privacy claim was not upheld.

Finally, the Illinois court in *Salamone v. Chicago Sun-Times, Inc.*,¹⁰⁹ concluded that the plaintiff's false light claim failed because the statement made by the defendant newspaper, describing plaintiff as a "reputed organized crime figure," was not verifiable as either true or false. Instead, use of the word "reputed" in front of derisive characterizations appeared to act as a safe harbor for the media.¹¹⁰ Furthermore, the court in *Riley v. Random House, Inc.*,¹¹¹ held that a "statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least . . . where a media defendant is involved."

Therefore in distinguishing an action for defamation from a claim for false light invasion of privacy, the Oklahoma Supreme Court has instructed that in the former, "recovery is sought primarily for the injury to one's reputation," that is, "what others may think of the person." Yet in the latter, the "interest to be vindicated is the injury to the person's own feelings."¹¹² Further, some falsehoods may cause

¹⁰⁹ *Salamone v. Chicago Sun-Times, Inc.*, 347 Ill. App. 3d 837 (2004).

¹¹⁰ *People v. Slover*, 323 Ill. App. 3d 620, 623 (2001)(citing 735 Ill. Comp. Stat. 5/8-901 et seq. (2001)(Illinois law grants reporters a statutory, qualified privilege protecting them from compelled disclosure of their sources. Thus, "reputed" as defined by whom did not have to be divulged.)).

¹¹¹ *Riley v. Random House, Inc.*, 2000 U.S. Dist. LEXIS 8596 (2000)(quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19-20 (1990)(citing *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986)).

¹¹² Oklahoma has recognized the false light invasion of privacy cause of action, holding one liable for publicizing a matter concerning another that places the plaintiff before the public in a false light, if: (1) the false light in which the plaintiff was placed would be highly offensive to a reasonable person, and (2) the defendant had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the plaintiff would be placed. RESTATEMENT (SECOND) OF TORTS § 652E; *Colbert v. World Publ'g. Co.*, 747 P.2d 286, 289 (Okla. 1987); *McCormack v. Oklahoma Publishing Co.*, 613 P.2d at 740. Likewise, in Nevada, false light claims extend beyond defamation in one respect: a plaintiff need not show injury to reputation. *Flowers v. Little, Brown & Co.*, 310 F.3d at 1132 (citing *People for the Ethical Treatment of Animals v. Bobby Berosini, Ltd.*, 111 Nev. 615 (Nev. 1995)(quoting *Rinsley v. Brandt*, 700 F.2d 1304, 1307 (10th Cir. 1983)("The false light privacy action differs from a defamation action in that the injury in privacy actions is mental distress from having been exposed to public view, while the injury in defamation actions is damage to reputation.")); *but see Solano v. Playgirl, Inc.*, 292 F.3d 1078, 1082 (9th Cir. 2002)(citing *Fellows v. Nat'l Enquirer, Inc.*, 42 Cal. 3d 234 (Cal. 1986)(California, unlike Nevada, requires injury to reputation for both false light and defamation.)).

subjective emotional distress even though they cause no loss of esteem.¹¹³ In such cases, a false light cause of action would permit recovery even though a claim in defamation would not.¹¹⁴

Thus, the plaintiff must prove that he was portrayed “in [a] false manner or that statements were untrue or misleading.”¹¹⁵ Mere negligence, however, is insufficient to establish the requisite fault necessary to hold a defendant liable.¹¹⁶ Instead, the Oklahoma Supreme Court has stated that the defendant must have “had a high degree of awareness of probable falsity or in fact entertained serious doubts as to the truth of the publication.”¹¹⁷

The First Circuit has held that “[t]he determination whether a printed statement is protected opinion or an unprotected factual assertion is a matter of law for the court.”¹¹⁸ In making such an assessment, the court must examine the context in which the injurious statement was made.¹¹⁹ A statement taken alone that might appear to

¹¹³ *Flowers v. Little, Brown & Co.*, 310 F.3d at 1132; *see e.g.*, RESTATEMENT (SECOND) OF TORTS § 652E cmt. b, illus. 5.

¹¹⁴ *Id.*

¹¹⁵ *McCormack*, 613 P.2d at 741; *see also* RESTATEMENT (SECOND) OF TORTS § 652E(b)(stating that false light claims, like defamation, require, at minimum, an implicit false statement of objective fact); *Kirchner v. Greene*, 294 Ill. App. 3d 672, 683 (1998)(the most basic element of a false light cause of action is a false statement).

¹¹⁶ *Hussain v. Palmer Communications Inc.*, 60 Fed. Appx. at 752; *Roshto v. Hebert*, 439 So. 2d 428, 430 (La. 1983)(“More than insensitivity or simple carelessness is required for the imposition of liability for damages when the publication is truthful, accurate and non-malicious.”).

¹¹⁷ *Colbert*, 747 P.2d at 289; *Stern v. WGNO, Inc.*, 806 So. 2d at 102 (quoting *Easter Seal Society v. Playboy Enterprises*, 530 So. 2d 643 (La. App. 4th Cir. 1988)(A television station defendant does not have a duty to avoid “reasonable, accurate publicity because it embarrasses and offends” the plaintiff or his family.); *see also* *Dubinsky v. United Airlines Master Executive Council*, 303 Ill. App. 3d 317, 332 (1999)(stating that in order to succeed on a false light claim, the plaintiff must demonstrate a false statement. However, strong language criticizing the plaintiff is insufficient to support such a cause of action.). Instead, the “reasonableness of the defendant’s conduct is determined by balancing the conflicting interests at stake; the plaintiff’s interest in protecting his privacy from serious invasions, and the defendant’s interest in pursuing his course of conduct.” *Daly v. Reed*, 669 So. 2d 1293, 1294 (La. App. 4th Cir. 1996).

¹¹⁸ *Fudge v. Penthouse Int’l, Ltd.*, 840 F.2d 1012, 1016 (1st Cir. 1988).

¹¹⁹ *See Phantom Touring, Inc. v. Affiliated Publications*, 953 F.2d 724, 727 (1st Cir. 1992); *McCabe v. Rattiner*, 814 F.2d 839, 842 (1st Cir. 1987)(adopting “an approach that analyzes the alleged defamation in the context of the article in which it appears along with the larger social context to which it relates.”).

be a factual assertion will nevertheless not be actionable if “the general tenor of the article negate[s] this impression.”¹²⁰ Furthermore, “where a statement obviously purports to be fictitious, there can be no ‘falsity of the publicized matter,’ and, therefore, no reckless disregard for such falsity.”¹²¹

The current standard of liability applied by many courts is one of “actual malice” which requires a demonstration of “knowledge of falsity or a reckless disregard” for the truth of the matter published, or for the false light in which the plaintiff will be placed.¹²² In other words, “to achieve the proper balance between First Amendment and privacy interests, the court held that the plaintiff must prove that the defendants acted with actual malice if the plaintiff is a public official or a public figure, or if the claim is asserted by a private individual about a matter of public concern.”¹²³ In fact, the U.S. Supreme Court

¹²⁰ *Riley v. Random House, Inc.*, 2000 DNH 84, at *17 (citing *Phantom Touring*, 953 F.2d at 727)(quoting *Milkovich*, 497 U.S. 1 at 21).

¹²¹ *Botts v. The New York Times Co.*, 2003 U.S. Dist. LEXIS 23785, at *19-20 (citing *Romaine v. Kallinger*, 109 N.J. 282, 295 (1988); *Hicks v. Casablanca Records*, 464 F. Supp. 426 (S.D.N.Y. 1978)). Literal truth of each of the published facts, however, is not an absolute defense to a false light claim. Instead, the facts themselves may be true, but “[l]iteral accuracy of separate statements will not render a communication true where the implication of the communication as a whole was false. . . . The question is whether [the defendant] made discrete presentations of information in a fashion which rendered the publication susceptible to inferences casting [the plaintiff] in a false light.” *West v. Media General Convergence, Inc.*, 53 S.W.3d 640, 645, fn. 5 (Tenn. 2001).

¹²² See *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989); *Tomlinson v. Kelley*, 969 S.W.2d 402 (Tenn. Ct. App. 1997); *Dodrill v. Arkansas Democrat Co.*, 265 Ark. 628, 637 (1979)(requiring that to prove a false light claim, Arkansas demands a showing of actual malice by clear and convincing evidence); *Peoples Bank and Trust v. Globe Int’l Publ’g, Inc.*, 978 F.2d 1065, 1068 (8th Cir. 1992)(explaining that “actual malice” involved the publication of false information with the intention that the public would construe it to be factual). Failure to investigate publicized matters, however, is not sufficient to demonstrate “actual malice,” even if a reasonably prudent person would have done so. *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

¹²³ *Harris v. Seattle*, 315 F. Supp. 2d 1105 (2004)(The court concluded plaintiff had failed to show that the defendant-broadcasters acted with actual malice. Plaintiff was found to be a public official for purposes of her false light claim filed against defendants for airing two reports and a series of promos allegedly invading her privacy. In so finding, the court held there was a strong nexus between her position and the allegedly false statements.); *West v. Media General Convergence, Inc.*, 2001 U.S. Dist. LEXIS 25230 (2001)(where the actual malice standard was found to apply to a false light invasion of privacy claim against a television station for broadcasting an investigative reporting series, entitled “Probation For Hire.” Such reports featured a probation counseling company and its president. The court explained that because the company’s president constituted a limited-purpose public figure, the actual malice standard applied. Regardless, even assuming that she did not qualify as a

has long extended substantial First Amendment protections to the media when matters of public interest are concerned.¹²⁴ Yet courts are still “divided as to whether this requirement likewise applies in cases brought by other plaintiffs.”¹²⁵ Generally, however, a negligence standard will suffice in such cases involving private individuals.¹²⁶

One of the universally required elements of invasion of privacy by false light, regardless of whether it involves a public figure, is the public disclosure of some falsity or fiction concerning the plaintiff.¹²⁷ Moreover, one court has held that in order to recover under a false light theory, the plaintiff must demonstrate that the defendants’ statements were “clearly directed at them.”¹²⁸ Nonetheless, the Supreme Court appears to exhibit a pro-media inclination with regard to false light invasion of privacy causes of action, requiring plaintiffs to overcome difficult obstacles before succeeding on such claims.

public figure, the president would have been required to prove actual malice under Tennessee law as an essential element of her false light claim since the subject of the news series highlighted a matter of public concern.).

¹²⁴ *Time, Inc. v. Hill*, 385 U.S. 374, 387-88 (1967)(The Court found that application of the “false light” claim was improper without proof that the media-defendant had publicized the report with knowledge of its falsity or in reckless disregard of the truth. Thus, because the Hill family failed to demonstrate “actual malice” on the part of *Time* magazine in publishing inconsistencies in the article’s version of the hostage ordeal, the publication deserved full First Amendment protection for publicizing a matter of substantial newsworthiness.). *But see* *Woodard v. Sunbeam Television Corp.*, 616 So. 2d 501, 502 (Fla. 3d DCA 1993); *Ortega v. Post-Newsweek Stations, Fla., Inc.*, 510 So. 2d 972 (Fla. 3d DCA 1987)(concluding that Florida’s fair reporting privilege extends to the publication of information contained in public records only if the broadcast is a “reasonably accurate and fair” description of the contents of the records.).

¹²⁵ *Harris v. Seattle*, 315 F. Supp. 2d 1105; *but see* *Blatty v. New York Times Co.*, 42 Cal. 3d 1033, 1043 (1986) (where the court held that “the requirement to show malice in a ‘false light’ claim applies only to public figures.”).

¹²⁶ Gary T. Schwartz, *Article: Explaining and Justifying a Limited Tort of False Light Invasion of Privacy*, 41 CASE W. RES. 885, 904 (1991).

¹²⁷ *Hoskins v. Howard*, 132 Idaho 311, 316 (1998)(Where the publication is free from material falsehood, recovery under this cause of action may not be had).

¹²⁸ *Mize v. Harvey Shapiro Enterprises, Inc.*, 714 F. Supp. 220, 225 (N.D. Miss. 1989) (“The Fifth Circuit has recognized that [the ‘of and concerning’] requirements are stringently applied by Mississippi courts and indicated that it will do the same.”)(citing *Mitchell v. Random House, Inc.*, 703 F. Supp. 1250, 1255 (S.D. Miss. 1988). *See also* *Myers v. The Telegraph*, 332 Ill. App. 3d 917 (2002) (holding that statements cannot defame a person or cast a person in a false light unless they are “of and concerning” that individual)(citing *Barry Harlem Corp. v. Kraff*, 273 Ill. App. 3d 388, 390 (1995)).

D. THE TORT OF APPROPRIATION OF A PRIVATE INDIVIDUAL'S NAME AND LIKENESS

Because the non-commercial publication of matters of public interest is privileged and not subject to a claim of misappropriation,¹²⁹ some states have based liability for misappropriation on the use of another's name or likeness *for a commercial purpose*,¹³⁰ such as for advertising or trade. Additionally, the right to publicity also "has its roots in the fourth type of invasion of privacy . . . appropriation of one's name or likeness."¹³¹ The Sixth Circuit has defined this statutory right as "an intellectual property right of recent origin which is the inherent right of every human being to control the commercial use of his or her identity. The right of publicity is a creature of state law and its violation gives right to a cause of action for the commercial tort of unfair competition."¹³²

¹²⁹ *Haskell v. Stauffer Communications, Inc.*, 26 Kan. App. 2d 541, 544 (1999); *see also* *Martinez v. Democrat-Herald Publishing Co.*, 64 Ore. App. 690 (Or. App. Ct. 1983)(no invasion of privacy by junior high newspaper after publishing photograph of plaintiff without her permission to illustrate a non-commercial, newsworthy article).

¹³⁰ [Emphasis added] Ohio law defines "commercial purpose" as the use of an individual's persona "in connection with" a product, merchandise, goods, or services. *See* OHIO REV. CODE ANN. § 2741.01. Meanwhile, Florida misappropriation law prohibits the use of a person's name or likeness to directly promote a product or service. *See* Fla. Stat. 540.08(1); *see, e.g.*, *Loft v. Fuller*, 408 So.2d 619, 622-23 (Fla. 4th DCA 1982). Furthermore, defendants who appropriate for their own use or benefit the reputation, prestige, social or commercial standing, public interest or other values associated with the name or likeness of the plaintiff, are subject to liability for invasion of privacy. *Botts*, 2003 U.S. Dist. LEXIS 23785, at *20 (citing *Tellado v. Time-Life Books, Inc.*, 643 F. Supp. 904, 908 (D.N.J. 1986)).

¹³¹ *Bosley*, 310 F. Supp. 2d at 920; "This fourth category of invasion of privacy – misappropriation of a person's name or likeness – has become known as the 'right of publicity.'" *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 834 (6th Cir. 1983)(This "right of publicity" differs from the first three types of the right of privacy; rather than the protection of a person's right "to be left alone," this right protects an individual's pecuniary interest in the commercial exploitation of his or her identity.). *See, e.g.*, *Ruffin-Steinback v. Hallmark Entertainment*, 82 F. Supp. 2d 723, 728 (2000)(citing *Tobin v. Civil Service Comm.*, 416 Mich. 661, 672 (1982))(quoting *Beaumont v. Brown*, 401 Mich. 80, 95 fn. 10 (1977))("The Michigan Supreme Court has recognized a tort-claim for the invasion of a right to privacy that includes misappropriation of a person's name or likeness.").

¹³² *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 928 (6th Cir. 2003); *see also* *Zacchini*, 433 U.S. at 573 ("The State's interest in permitting a 'right of publicity' is in protecting the proprietary interest of the individual . . . [which] is closely analogous to the goals of patent and copyright law."). *But see* *Tyne v. Time Warner Entertainment Co.*, 336 F.3d at 1286 (where the court found that commercial misappropriation law did not extend to the use of the decedent's name or likeness).

For instance, in *Cummings v. Sony Music*, a magistrate judge concluded that the plaintiff musician had properly stated a claim under Florida's right of publicity statute.¹³³ The use of the musician's likeness on three compact disc covers was found to be actionable under Florida law. Even under a narrow reading of Fla. Stat. ch. 540.08, an allegation of the public use of the plaintiff's photograph for commercial purposes without permission established a cause of action. The statutory right to publicity is distinguishable from the common law right to privacy in that, under common law, "a defendant need not appropriate a plaintiff's image for economic gain to violate one's right to privacy."¹³⁴ Moreover, "the privacy right is a personal interest which cannot be transferred while the right to publicity is a property interest which is assignable."¹³⁵ However, "statutes regarding the right to publicity do not trump the common law right to privacy."¹³⁶

Nevertheless, the U.S. Supreme Court has recognized a newsworthiness privilege that allows the right of the press to publish matters of public interest to take precedence over the common law right to privacy.¹³⁷ Typically, this public affairs exception has applied to news reports of television, radio, and the print media.¹³⁸ In fact, to avoid a collision between rights, some jurisdictions have even

¹³³ *Cummings v. Sony Music*, 2003 U.S. Dist. LEXIS 17394.

¹³⁴ *Bosley v. WildWetT.com*, 310 F. Supp. 2d 914, 920 (2004)(citing RESTATEMENT (SECOND) OF TORTS § 652C, cmt. b).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Time, Inc. v. Hill*, 385 U.S. 374, 384 (1967).

¹³⁸ *Jacova v. Southern Radio & Television Co.*, 83 So. 2d 34, 37 (Fla. 1955)(where the court held that there was no common law right of privacy in a news telecast when a bystander became an actor in a gambling raid on cigar store); *Cape Publications, Inc. v. Bridges*, 423 So.2d 426, 428 (Fla. 5th DCA 1982)(no invasion of privacy when newspaper published photograph of plaintiff clad in a dishtowel after police rescued her from estranged husband); *Stafford v. Hayes*, 327 So.2d 871 (Fla. 1st DCA 1976)(no right of privacy claim when television crew filmed individual at hotel bar after state capitol had been evacuated by bomb threat); cf. *Howell v. New York Post Co., Inc.*, 81 N.Y.2d 115 (N.Y. App. Ct. 1993)(photograph of psychiatric patient walking with another well-known patient published by newspaper was protected as newsworthy).

recognized a First Amendment protection against misappropriation claims for a person's name or likeness appearing in news articles.¹³⁹

If a communication is about a matter of public interest and there is a real relationship between the plaintiff and the subject matter, the publication is privileged.¹⁴⁰ The cases uniformly apply the newsworthiness privilege to matters published by the media, even if they are published to make a profit.¹⁴¹ Courts have even extended the privilege to matters about private individuals that are of interest to the public.¹⁴²

For example, the Mackinac Center for Public Policy think tank published a letter that included a statement made by the president and mailed it as part of a fundraising campaign.¹⁴³ The president filed a claim for misappropriation invasion of privacy. Yet the court found in favor of the publishers despite the fact that the letter had a commercial purpose. Instead, because the publication attempted to educate its readers on a number of public policy issues, it fell within the protective ambit of the First Amendment as a matter of public interest.

To recover under a misappropriation of identity theory, a plaintiff must demonstrate that he was identified by the defendant.¹⁴⁴ "However, the mere public mention of a plaintiff's name does not constitute an appropriation of its value."¹⁴⁵ Instead, use of the

¹³⁹ *Haskell v. Stauffer Communications, Inc.*, 26 Kan. App. 2d at 545; *see also* *Bosley*, 310 F. Supp. 2d at 924 ("In modern times, one could extend this analysis to conclude that information relating to a legitimate public interest on an internet web page is protected communication.").

¹⁴⁰ *Ault v. Hustler Magazine, Inc.*, 860 F.2d 877, 880 (9th Cir. 1988); *Lane v. Random House, Inc.*, 985 F. Supp. 141, 146 (D.D.C. 1995).

¹⁴¹ *Jenkins v. Dell Publishing Co.*, 251 F.2d 447 (3rd Cir. 1958); *Mendonsa v. Time, Inc.*, 678 F. Supp. 967 (D.R.I. 1988); *Guglielmi v. Spelling-Goldberg Productions*, 25 Cal. 3d 860 (1979); *Stephano v. News Group Pub.*, 64 N.Y.2d 174 (1984).

¹⁴² *Bernstein v. National Broadcasting Co.*, 129 F. Supp. 817 (D.D.C. 1955); *Everett v. Carvel Corp.*, 70 Misc. 2d 734 (1972). *See also* *Scelfo v. Rutgers University*, 116 N.J. Super. 403 (N.J. Super. 1971)(citing *Rosenblatt v. Baer*, 383 U.S. 75 (1966))("In balancing the societal interest in free speech and press against the individual interest in reputation, courts have chosen not to limit the former except to prevent injury from defamatory statements reasonably susceptible of a definite application to a particular individual.").

¹⁴³ *Battaglieri v. Mackinac Center for Public Policy*, 261 Mich. App. 296 (2004).

¹⁴⁴ *Gales v. CBS Broadcasting, Inc.*, 2004 U.S. Dist. LEXIS 22937, at * 37.

¹⁴⁵ *Botts*, 2003 U.S. Dist. LEXIS 23785, at *20 (citing RESTATEMENT (SECOND) OF TORTS § 652C). Unless use of the name or likeness of plaintiff actually adds value to or assists in selling the product at issue, "the defendant is free to [use] any name he likes, whether there is

plaintiff's name or likeness must be primarily for trade purposes, lacking any redeeming public interest, news, or historical value.¹⁴⁶ In defining "for the purposes of trade," the court in *Ruffin-Steinback v. Hallmark Entertainment* omitted "the use of a person's identity in news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to such uses."¹⁴⁷ Therefore, the simple fact that the publisher was successful in obtaining a commercial advantage from an otherwise permitted use of another's identity does not render the appropriation actionable.¹⁴⁸

As described by the Restatement:

The value of a plaintiff's name is not appropriated by mere mention of it, or by reference to it in connection with legitimate mention of his public activities; nor is the value of his likeness appropriated when it is published for purposes other than taking advantage of his reputation, prestige, or other value associated with him, for purposes of publicity. No one has the right to object merely because his name or his appearance is brought before the public, since neither is in any way a private matter and both are open to public observation. It is only when the publicity is given for the purpose of appropriating to the defendant's benefit the commercial or other values associated with the name or the likeness that the right of privacy is invaded. The fact that the defendant is engaged in the business of publication, for example of a newspaper, out of which he makes or seeks to

only one person or a thousand others of the same name." Botts, 2003 U.S. Dist. LEXIS 23785, at *21 (quoting *Hooker v. Columbia Pictures Indus., Inc.*, 551 F. Supp. 1060 (N.D. Ill. 1982)).

¹⁴⁶ Tellado, 643 F. Supp. at 910. "Even if the defendant is engaged in the business of publication of . . . a newspaper . . . [for] profit, the incidental publication of a plaintiff's name is not a commercial use of the name or likeness." RESTATEMENT (SECOND) OF TORTS § 652C. As a result, even though a newspaper is not a philanthropic organization, it is nonetheless not liable for appropriation to every person whose name or likeness it publishes. *Id.*

¹⁴⁷ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995). Instead, a person's identity of likeness are used "for the purposes of trade . . . if they are used in advertising the user's goods or services, or are placed on merchandise marketed by the user, or are used in connection with services rendered by the user." *Id.*

¹⁴⁸ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47, cmt. c (1995).

make a profit, is not enough to make the incidental publication a commercial use of the name or likeness.¹⁴⁹

The tort of commercial appropriation is therefore founded on the recognition that an individual has an interest in his name or likeness "in the nature of a property right."¹⁵⁰ Its most common form consists of "the appropriation and use of the plaintiff's name or likeness to advertise the defendant's business or product."¹⁵¹ In other words, the use of plaintiff's name or likeness "for trade purposes" is where a defendant seeks to capitalize on another's likeness for purposes other than the news.¹⁵² One reason for imposition of such tort liability for commercial misappropriation is to avoid the unjust enrichment that would result from uncompensated use of the name or likeness of another.¹⁵³

For example, in *Villalovos v. Sundance Associates, Inc.*,¹⁵⁴ the court found that the plaintiff had stated a viable claim for appropriation as well as for false light invasion of privacy. The plaintiff alleged that the defendant had published lewd and scandalous statements about her without her knowledge or consent. The defendant publishes and distributes a nationwide hardcore pornographic magazine. In one of its issues, the defendant had published a personal advertisement that included a photograph of a woman soliciting adulterous and sexually provocative acts. The advertisement also included the plaintiff's first name, last initial, and home address, although the picture was not that of plaintiff. The court

¹⁴⁹ RESTATEMENT (SECOND) OF TORTS § 652C, comment d (1977) (Restatement definition of "invasion of privacy" adopted by Kansas).

¹⁵⁰ *Castro v. NYT Television*, 370 N.J. Super. at 297 (quoting RESTATEMENT (SECOND) OF TORTS, § 652C comment a).

¹⁵¹ *Id.*, comment b.

¹⁵² See *Faber v. Condecor, Inc.*, 195 N.J. Super. 81, 88 (1984); see also *Tellado v. Time-Life Books, Inc.*, 643 F. Supp. 904, 909-10 (D.N.J. 1986) ("Under New Jersey common law, defendants would be liable for the tort of misappropriation of likeness only if defendant's use of plaintiff's likeness was for a predominantly commercial purpose, i.e., if defendant was seeking to capitalize on defendant's likeness for purposes other than the dissemination of news of information.").

¹⁵³ See RESTATEMENT (SECOND) OF TORTS, § 652I comment b (noting that "appropriation of name or likeness . . . involves an aspect of unjust enrichment.").

¹⁵⁴ *Villalovos v. Sundance Associates, Inc.*, 2003 U.S. Dist. LEXIS 387 (2003).

upheld plaintiff's appropriation and false light claims after finding that her complaint clearly alleged facts that were entirely relevant to the dispute. Moreover, the Illinois Right of Publicity Act¹⁵⁵ expressly forbids the use of an individual's identity for commercial purposes without having first obtained written consent.¹⁵⁶

Similarly, in *Bosley v. WildWetT.com*,¹⁵⁷ the plaintiff contestant, having worked as a news anchor for approximately a decade, was a regional celebrity in Ohio. The plaintiff had participated in a wet T-shirt contest filmed by the defendant, a producer of adult videotapes. In a motion for a preliminary injunction, the plaintiff alleged that defendants' sale of the videos and use of her images on their websites violated her right of publicity as protected by state statutes and common law.¹⁵⁸ First, the plaintiff argued that her implied consent to being photographed did not satisfy the requisite element of express oral consent from each contestant to permit commercial use of her images, as required by Florida statute. Further, Ohio law also prohibits the publication of another's name or likeness for commercial use, drawing from the plaintiff's "reputation, prestige, or other value associated with him, for purposes of publicity."¹⁵⁹

The court agreed, granting plaintiff's motion for injunctive relief. In so doing, the court concluded that the prominent displays of her name, image, and likeness on the cover of defendants' video and website were not merely "incidental to the promotion" of their products, but rather constituted an advertisement. Further, even as commercial speech, the images of the plaintiff neither contained expressive nor editorial content protected under the First Amendment. As such, the court upheld her right of publicity claim against the defendant broadcasters.

Yet in 2003, a celebrity plaintiff had filed a complaint against an entertainer and several production companies, claiming he had been the inspiration for a cartoon character that appeared in a television

¹⁵⁵ The Right of Publicity Act, 765 Ill. Comp. Stat. 1075/1 et seq (1999).

¹⁵⁶ 765 Ill. Comp. Stat. 1075/30(a) (1999).

¹⁵⁷ *Bosley v. WildWetT.com*, 310 F. Supp. 2d 914 (2004).

¹⁵⁸ *Id.* at 920 ("Ohio and Florida statutes protect one's right of publicity, stating that an individual has the right to own, protect, and commercially exploit his or her own name, likeness, or persona."); see OHIO REV. CODE ANN. § 2741.02 and Fla. Stat. ch. 540.08.

¹⁵⁹ *Bosley*, 310 F. Supp. 2d at 919 (quoting *Zacchini v. Scripps-Howard Broadcasting Co.*, 47 Ohio St.2d 224, 231 (Ohio 1976)).

comedy.¹⁶⁰ Although, like in *Villalovos*, the individual similarly asserted violations of the Illinois Right of Publicity Act and common law invasion of privacy, the court refused to acknowledge any valid claims here. Instead, the court dismissed the action finding that the state's Right of Publicity Act exempted artistic works from its coverage, including television productions, thereby avoiding First Amendment issues. The common law claims¹⁶¹ were also dismissed because the famous individual had no right to object merely because his name or appearance were brought before the public, because neither constituted a private matter but instead were open to public observation.

Likewise, in *Castro v. NYT Television*, patient plaintiffs sued after the defendants had filmed them while they were being treated at the emergency room. Although they had signed consent forms, the patients claim that they had been in no condition to do so.¹⁶² The court agreed, holding that the New Jersey Hospital Patients Bill of Rights Act clearly intended to allow only for complaints in a regulatory context. Because their likenesses had not been used for commercial purposes, however, the court concluded that the plaintiffs had failed to state a proper common law appropriation claim.

Moreover, an absence of evidence that a defendant magazine had actually capitalized on the plaintiff's likeness proved to be the downfall of the plaintiffs' claim in *Stanley v. General Media Communications, Inc.*¹⁶³ Two high school students had sued the publisher of a sexually-oriented magazine alleging false light invasion of privacy and misappropriation. The female students had participated

¹⁶⁰ See *Collier v. Eddie Murphy Productions, Inc.*, 2003 U.S. Dist. LEXIS 4821 (2003).

¹⁶¹ Several exceptions exist to the common law right to persona and image. For instance, "incidental use of one's name or likeness is permissible." Bosley, 310 F. Supp. 2d at 920 (citing *Vinci v. American Can Co.*, 69 Ohio App. 3d 727 (Ohio 1990)(where the court held that informational blurbs about weight-lifting Olympic gold medalist, Charles Vinci, on Dixie Cups was merely incidental to the promotion of the cups, thus permissible)). One's name and appearance themselves are not private, and may be brought before the public. Vinci, 69 Ohio App. 3d at 727. Finally, a legitimate public interest exception exists in that, "[o]ne of the primary limitations upon the right of privacy is that this right does not prohibit the publication of matters of general or public interest, or the use of the name or picture of a person in connection with the publication of legitimate news." *Cason v. Baskin*, 155 Fla. 198, 216 (Fla. 1944)(quoting 41 Am. Jur. 937-38). Nevertheless, "public or general interest" is not to be construed in such a way to imply mere curiosity. *Id.* (quoting 41 Am. Jur. 935).

¹⁶² *Castro v. NYT Television*, 370 N.J. Super. 282 (2004).

¹⁶³ *Stanley v. General Media Communications, Inc.*, 149 F. Supp. 2d 701 (2001).

in a contest while on Spring Break, in which each contestant was blindfolded while she unwrapped a condom and placed it on a white plastic phallus. Although the students concede they did not have any expectation of privacy during the contest, they nonetheless objected to their photograph being published in the magazine. The court ultimately held that although the students were identified by name and hometown, there was no evidence to suggest that they would be easily identifiable to the general public.¹⁶⁴ As a result, their misappropriation claim must fail.¹⁶⁵ Finally, because neither the photo nor the accompanying text was false, the students' false light claim was similarly dismissed.

Lastly, in order to establish unjust enrichment as a basis for quasi-contractual liability, "a plaintiff must show both that a defendant received a benefit and that retention of the benefit would be unjust."¹⁶⁶ Such liability will be imposed only if the "plaintiff expected remuneration from the defendant, or where, if the true facts had been known to the plaintiff, he would have expected remuneration from defendant, at the time the benefit was conferred."¹⁶⁷ Absent express agreement, a member of the general public who is subject to videotaping for a television program cannot reasonably expect that he or she will receive payment from the producer of the show.¹⁶⁸ In fact, a substantial First Amendment issue would be raised if a court were to find a right of compensation in such circumstances.¹⁶⁹

¹⁶⁴ "[T]he public must be able to identify the person from the photograph or drawing, and the defendant must have capitalized upon the likeness of that person in order to sell more magazines or newspapers." *Faloon v. Hustler Magazine*, 607 F. Supp. 1341, 1360 (N.D. Tex. 1980).

¹⁶⁵ *Id.* Likewise, in *Botts v. The New York Times Co.*, the court found that the plaintiff had failed to establish a valid cause of action for misappropriation, because the plaintiff's name was not used for trade purposes nor was it tied to the organization which the ad promoted. 2003 U.S. Dist. LEXIS 23785. Furthermore, a court dismissed a misappropriation claim filed against the producer of a television show in which the plaintiff had appeared arising from the use of her likeness in advertisements for the show. The court explained that dismissal was proper because the show constituted an expressive work subject. *Daly v. Viacom, Inc.*, 238 F. Supp. 2d 1118 (2002).

¹⁶⁶ *VRG Corp. v. GKN Realty Corp.*, 135 N.J. 539, 554 (1994).

¹⁶⁷ *Callano v. Oakwood Park Homes Corp.*, 91 N.J. Super. 105, 109 (App. Div. 1966).

¹⁶⁸ *Castro v. NYT Television*, 370 N.J. Super. at 300.

¹⁶⁹ *Id.*; compare *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 571-78 (1977) with *Time, Inc. v. Hill*, 385 U.S. 374, 397 (1967).

III. NEW CHALLENGES IN TODAY'S INFORMATION AGE AFFECTING THE INJURED PRIVATE CITIZEN'S RIGHT TO RECOVERY FOR INVASION OF PRIVACY TORTS.

In light of the pro-media presumption of courts and the hardships already imposed on the private plaintiff in proving any intrusion of seclusion claim, today's Information Age introduces a medley of new challenges. Society's fervent interest in sensitive issues demands the exercise of the public's "right to know." In order for journalists to report accurately and fully, it is essential to encourage an uninhibited, spirited press. In the Information Age, however, the citizen's right to privacy is even further diminished in the face of the media's growing freedom to report. With a multitude of outlets and venues for disseminating private yet newsworthy information about public figures and officials, the press necessarily infringes on their right to solitude.

Modern technology¹⁷⁰ appears to favor the press by allowing the press to invoke First Amendment rights when confronted by claims of intrusive newsgathering or publication. Special concerns may consequently arise with respect to the privacy of individual citizens, particularly those who became unwillingly or inadvertently exposed to intense public scrutiny as the subject of a criminal investigation. As a result, it is clear that special precautionary measures must be taken to insure that the freedom of the press does not outweigh the citizen's right to privacy.

From a public policy standpoint, in order to maintain the proper balance, a court must "step in and protect the media from tort liability when it expressly believes that failing to act would result in a chilling effect on the press' ability to report the news."¹⁷¹ Holding the media liable for damages resulting from torts incurred during newsgathering processes will result in such a chilling of the media.¹⁷² The fear of liability forces journalists to grow overly cautious, discouraging them

¹⁷⁰ An interesting discourse has been evolving discussing media rights and the potential remedies, if any, for an invasion of privacy on the Internet.

¹⁷¹ Nick, *supra* note 17, at 225.

¹⁷² Carolyn K. Foley & David A. Schulz, *Damage Considerations When the Press Is Sued for Gathering the News*, Libel Def. Resource Center Bull., April 30, 1997, reprinted in 1 Libel & Newsgathering Litigation: Getting & Reporting the News, at 129, 201 (PLI Patents, Copyrights, and Literary Prop. Course Handbook Series No. G-522, 1988).

from use of certain newsgathering techniques, thereby preventing the discovery of pertinent information and effectively chilling speech.¹⁷³

IV. DO THE MEDIA'S FIRST AMENDMENT RIGHTS TO REPORT ON NEWSWORTHY MATTERS OF PUBLIC CONCERN COLLIDE WITH THE "RIGHTS" OF POST-MORTEM SUBJECTS?

To date, courts have been unable to provide a clear answer to the increasingly complex question as to whether individuals maintain their right to privacy following their death. For instance, Florida has a general rule which states that relatives of a decedent may not maintain a cause of action for invasion of privacy "either based on their own privacy interests or as a representative for the deceased where the alleged invasion was directed . . . primarily at the deceased."¹⁷⁴ However, the only exception to this rule precluding derivative false light claims "occurs when plaintiffs experience an independent violation of their own personal privacy rights other than the violation alleged to have occurred indirectly by virtue of the publicity given to the deceased. . . ."¹⁷⁵ Such an exception exists to recognize that the "relatives of the deceased have their own privacy interest in protecting their rights in the character and memory of the deceased as well as the right to recover for their own humiliation and wounded feelings caused by the publication."¹⁷⁶

Nonetheless, such a "relational right of privacy" exception is still very limited and rare, applying only where "a defendant's conduct towards a decedent [is] found to be sufficiently egregious to give rise to an independent cause of action in favor of members of [the] decedent's immediate family."¹⁷⁷ In rejecting a proper "relational" right of privacy claim, the Florida courts have expressly required that a

¹⁷³ Andrew B. Sims, *Food for the Lions: Excessive Damages for Newsgathering Torts and the Limitations of Current First Amendment Doctrines*, 78 B.U. L. REV. 507, 526 (1998).

¹⁷⁴ *Tyne v. Time Warner Entertainment Co.*, 336 F. 3d at 1292 (quoting *Loft v. Fuller*, 408 So. 2d 619, 623 (Fla. Dist. Ct. App. 4th Dist. 1981).

¹⁷⁵ *Williams v. Minneola*, 575 So. 2d 683, 689 (Fla. Dist. Ct. App. 5th Dist. 1991).

¹⁷⁶ *Loft*, 408 So. 2d at 624.

¹⁷⁷ *Id.* (cautioning that relatives "must shoulder a heavy burden in establishing [such] a cause of action."). Further, "while the Florida courts have expressly declined to foreclose all invasion of privacy actions brought by the relatives of a decedent, it is clear that such actions are heavily disfavored." *Tyne v. Time Warner Entertainment Co.*, 336 F.3d at 1292.

defendant's conduct constitute "egregious" behavior, not merely inaccurate or dramatized.¹⁷⁸ Therefore, such an exception does not provide a "derivative cause of action for minor technical inaccuracies, or even major ones."¹⁷⁹

The case law remains scarce as to the rights to privacy of post-mortem subjects, however. So far, Florida seems to have deciphered the clearest and most manageable rule for other jurisdictions to look to when confronted with such questions. Nonetheless, this remains a growing area of jurisprudence that legal scholars and experts continue to observe and monitor until more lucid and definitive answers are derived.

V. CONCLUSION

As media law slowly begins to take shape in light of citizens' right to privacy, recognition of such issues relating to "defamation, invasion of privacy, reporter's privilege, cameras in the courtroom, and the contours of First Amendment" help to expand protections afforded to the media during the newsgathering process.¹⁸⁰ Among the many states attempting to strike the proper balance between adequate protection of journalists' First Amendment rights and the individual's right to privacy, Idaho's judiciary¹⁸¹ has begun defining free speech boundaries.¹⁸²

¹⁷⁸ Loft, 408 So. 2d at 624.

¹⁷⁹ See *id.*; Williams, 575 So. 2d at 689-90.

¹⁸⁰ Debora K. Kristensen, *Law in Idaho: Where Are We?*, 40 IDAHO L. REV. 395, 396 (2004).

¹⁸¹ Russell A. Joki, *In the Public Interest: Idaho Communications Law & Issues Handbook 1* (New Forums Press, Inc. 2003)(citing Prof. Dennis Colson, University of Idaho).

¹⁸² See, e.g., *Uranga v. Federated Publ'ns, Inc.*, 138 Idaho 550, 67 P.3d 29 (2003), cert. denied, 124 S. Ct. 277 (2003) (involving an article published in the "Idaho Statesman" divulging plaintiff's homosexual activities in the midst of an anti-gay initiative on the statewide ballot; the plaintiff alleged invasion of privacy by intrusion, invasion of privacy through publication of private facts, false light invasion of privacy, and intentional and/or reckless infliction of emotional distress.); *Worrell-Payne v. Gannett Co., Inc.*, 134 F. Supp. 2d 1167 (D. Idaho 2000), *aff'd*, 49 Fed. Appx. 105 (9th Cir. 2002) (discussing newspaper's decision to publish the chronicled allegations of mismanagement, nepotism, and frequent absenteeism of Worrell-Payne serving in her capacity as Executive Director of the local Housing Authority); *Steele v. Spokesman-Review*, 61 P.3d 606 (2002) (assessing Steele's claims against the "Spokesman-Review" for statements that were allegedly untrue or falsely depicted or implied that he was a white supremacist; thus, Steele sued for defamation, invasion of privacy, and emotional distress.).

Until recently, the Idaho judiciary has relied upon U.S. Supreme Court precedent and the Restatement (Second) of Torts for delineating limitations of the media's free speech.¹⁸³ However, as best stated by one of its own courts, what really lies "[a]t the heart of each of these [invasion of privacy] claims is the definition of what constitutes a '*reasonable* expectation of privacy.'"¹⁸⁴ In fact, an Idaho court recently defined "reasonable expectation of privacy" as being "relative to the customs of the time and place, and is determined by the norm of the ordinary person."¹⁸⁵ As it stands, the struggle to define the nebulous limits of a free press and an individual's right to privacy remains as the courts further wrestle with the inherent line-drawing problem. Nonetheless, for the time being, it would appear that so long as the media respects the citizen's right to privacy within the boundaries of the four tort remedies available in the instance of an invasion, the two rights can co-exist harmoniously.

¹⁸³ *Id.* at 397.

¹⁸⁴ [Emphasis added] Kristensen, *supra* note 180, at 413.

¹⁸⁵ *Jensen v. State*, 72 P.3d 897, 902 (2003).

